

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter 1

Effective Date for Swap Regulation

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed amendment.

SUMMARY: On July 14, 2011, the Commodity Futures Trading Commission (“CFTC” or the “Commission”) issued a final order (“July 14 Order”) that grants temporary exemptive relief from certain provisions of the Commodity Exchange Act (“CEA”) that otherwise would have taken effect on the general effective date of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“the Dodd-Frank Act”) – July 16, 2011. The July 14 Order grants temporary relief in two parts. The first part addresses those CEA provisions added or amended by title VII of the Dodd-Frank Act that reference one or more terms regarding entities or instruments that title VII requires be “further defined” to the extent that requirements or portions of such provisions specifically relate to such referenced terms and do not require a rulemaking. The second part, which is based on part 35 of the Commission’s regulations, addresses certain provisions of the CEA that may apply to certain agreements, contracts, and transactions in exempt or excluded commodities as a result of the repeal of various CEA exemptions and exclusions as of the general effective date of July 16, 2011. This is a notice of a proposed amendment to that July 14 Order, 76 FR 42508 (July 19, 2011), that would modify the temporary exemptive relief provided therein by: (1) extending the potential latest expiration date of the July 14 Order; and (2) adding provisions to account for the repeal and replacement (as of

December 31, 2011) of part 35 of the Commission's regulations. Only comments pertaining to these proposed amendments to the July 14 Order will be considered as part of this Notice.

DATES: Submit comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments may be submitted, referenced as "Effective Date Amendments," by any of the following methods:

- Agency web site, via its Comments Online process at <http://comments.cftc.gov>. Follow the instructions for submitting comments through the web site.
- Mail: David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.
- Hand Delivery/Courier: Same as mail above.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to www.cftc.gov. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in § 145.9 of the Commission's regulations, 17 CFR 145.9.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from www.cftc.gov that it may deem to be inappropriate for publication, such as obscene language. All submissions that have

been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Terry Arbit, Deputy General Counsel, 202-418-5357, tarbit@cftc.gov, or Mark D. Higgins, Counsel, 202-418-5864, mhiggins@cftc.gov, Office of the General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act into law.¹ Title VII of the Dodd-Frank Act amends the CEA² to establish a comprehensive new regulatory framework for swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the rulemaking and enforcement authorities of the Commission with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.³

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

² 7 U.S.C. 1 et seq.

³ Title VII also includes amendments to the federal securities laws to establish a similar regulatory framework for security-based swaps under the authority of the Securities and Exchange Commission ("SEC").

Section 754 of the Dodd-Frank Act states that, unless otherwise provided, the provisions of subtitle A of title VII of the Dodd-Frank Act⁴ “shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle.” Thus, the general effective date for provisions of title VII that do not require a rulemaking was July 16, 2011. This includes the provisions that repealed several provisions of the CEA as in effect prior to the Dodd-Frank Act that excluded or exempted, in whole or in part, certain transactions from Commission oversight.⁵

Section 712(d)(1) of the Dodd-Frank Act requires the Commission and the SEC to undertake a joint rulemaking to “further define” certain terms used in title VII, including the terms “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant.”⁶ Section 721(c) requires the Commission to adopt a rule to “further define” the terms “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant” to prevent evasion of statutory and regulatory obligations.⁷ The Commission has issued two notices of proposed rulemaking that address these further definitions.⁸

⁴ All of the amendments to the CEA in title VII are contained in subtitle A. Accordingly, for convenience, references to “title VII” in this Notice shall refer only to subtitle A of title VII.

⁵ These exclusions and exemptions were contained in former CEA sections 2(d), 2(e), 2(g), 2(h), and 5d, 7 U.S.C. 2(d), 2(e), 2(g), 2(h), and 7a-3.

⁶ Section 712(d)(1) provides: “Notwithstanding any other provision of this title and subsections (b) and (c), the Commodity Futures Trading Commission and the Securities and Exchange Commission, in consultation with the Board of Governors [of the Federal Reserve System], shall further define the terms ‘swap’, ‘security-based swap’, ‘swap dealer’, ‘security-based swap dealer’, ‘major swap participant’, ‘major security-based swap participant’, and ‘security-based swap agreement’ in section 1a(47)(A)(v) of the Commodity Exchange Act (7 U.S.C. 1a(47)(A)(v)) and section 3(a)(78) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(78)).”

⁷ Section 721(c) provides: “To include transactions and entities that have been structured to evade this subtitle (or an amendment made by this subtitle), the Commodity Futures Trading Commission shall adopt a rule to further define the terms ‘swap’, ‘swap dealer’, ‘major swap participant’, and ‘eligible contract participant’.”

⁸ See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 75 FR 80174, Dec. 21, 2010 and Further

The Commission's final rulemakings further defining the terms in sections 712(d) and 721(c) were not expected to be in effect as of July 16, 2011 (i.e., the general effective date set forth in section 754 of the Dodd-Frank Act). Accordingly, the Commission on July 14, 2011 exercised its exemptive authority under CEA section 4(c)⁹ and its authority under section 712(f) of the Dodd-Frank Act by issuing the July 14 Order.¹⁰ In so doing, the Commission sought to address concerns that had been raised about the applicability of various regulatory requirements to certain agreements, contracts, and transactions after July 16, 2011, and thereby ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime.¹¹

Description of Existing Relief

The July 14 Order groups the relevant provisions of the Dodd-Frank Act into four categories and provides temporary exemptive relief, set to expire no later than December 31, 2011, with respect to Categories 2 and 3. A summary of the four categories of provisions follows.

Category 1 covers statutory provisions which by their express terms require rulemaking to implement. Because, under section 754 of the Dodd-Frank Act, these provisions do not

Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 FR 29818, May 23, 2011.

⁹ 7 U.S.C. 6(c).

¹⁰ Effective Date for Swap Regulation, 76 FR 42508 (issued and made effective by the Commission on July 14, 2011; published in the Federal Register on July 19, 2011).

¹¹ Concurrent with the July 14 Order, the Commission's Division of Clearing and Intermediary Oversight and the Division of Market Oversight (together "the Divisions") identified certain provisions of the Dodd-Frank Act and CEA as amended that would take effect on July 16, 2011, but that may not be eligible for the exemptive relief provided by the Commission in its July 14 Order – specifically, the amendments made to the CEA by Dodd-Frank Act sections 724(c), 725(a), and 731. On July 14, 2011, the Divisions issued Staff No-Action Relief addressing the application of these provisions after July 16, 2011. Available at: <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/noactionletter071411.pdf> (last visited Sept. 26, 2011). The Commission anticipates that the Divisions will extend and conform this no-action relief to any final amendment to the July 14 Order that may result from this proposal.

become effective until at least 60 days after the final rule is published, no exemptive relief from the general effective date is necessary. Category 1 provisions include, among others, the further definitions of terms regarding swap entities or instruments as required by the Dodd-Frank Act (such as the terms “swap,” “swap dealer,” “major swap participant,” or “eligible contract participant”). Category 1 also includes, among others: (1) registration, capital and margin requirements, and business conduct standards for swap dealers and major swap participants; (2) provisions prohibiting agricultural swaps except pursuant to CFTC rules; (3) rules regarding swap execution facilities; and (4) various swap data recordkeeping and reporting requirements. A complete list of the Category 1 provisions is included in the appendix to the July 14 Order.

The first part of the relief provided for in the July 14 Order reaches those Dodd-Frank Act provisions (“Category 2 provisions”) that are self-effectuating (i.e., do not require a rulemaking) and that reference one or more of the terms for which the Commission and SEC are required to provide further definition, including “swap,” “swap dealer,” “major swap participant,” “eligible contract participant,” and “security-based swap agreement” (collectively, the “referenced terms”). These Category 2 provisions include, for example, the trade execution requirement of CEA section 2(h)(8), as amended by Dodd-Frank Act section 723. A complete list of the Category 2 provisions is included in the appendix to the July 14 Order. Because the Category 2 provisions would have taken effect on July 16, 2011 pursuant to section 754, the Commission granted temporary relief from those provisions, but only to the extent that the requirements in such provisions specifically relate to a referenced term that is not yet further defined. Thus, if a Category 2 provision also applies to futures or options on futures, the provision took effect on July 16 with respect to futures or options on futures. The exemption for

Category 2 provisions expires on the earlier of: (1) the effective date of the applicable final rule further defining the relevant term; or (2) December 31, 2011.

In part two of the July 14 Order, the Commission provides temporary exemptive relief from the provisions of the CEA that may apply to certain agreements, contracts, and transactions in exempt or excluded commodities (generally, financial, energy and metals commodities) as a result of the repeal of the CEA exemptions and exclusions in former CEA sections 2(d), 2(e), 2(g), 2(h), and 5d as of July 16, 2011 pursuant to sections 723(a)(1) and 734(a) of the Dodd-Frank Act (the “Category 3 provisions”). As explained in the July 14 Order, this relief is based on the Commission’s existing “part 35” exemptive rules.¹²

Part 35 originally was promulgated in 1993 pursuant to, among others, the Commission’s general exemptive authority in CEA section 4(c) and its plenary options authority under section 4c(b),¹³ and provides a broad-based exemption from the CEA for “swap agreements” in any commodity. Specifically, part 35 exempts “swap agreements,” as defined therein, from most of the provisions of the CEA if: (1) they are entered into by “eligible swap participants” (“ESPs”);¹⁴ (2) they are not part of a fungible class of agreements standardized as to their material economic terms; (3) the creditworthiness of any party having an actual or potential obligation under the swap agreement would be a material consideration in entering into or

¹² 76 FR at 42514. The July 14 Order did not extend to agreements, contracts, or transactions that fully met the conditions of part 35, since in such circumstances further relief was unnecessary.

¹³ 7 U.S.C. 6c(b).

¹⁴ As noted in the July 14 Order, the parties covered under the ESP definition, while very broad, are not coextensive with those covered by the terms “eligible commercial entity” or “eligible contract participant.” Therefore, it is possible that a small segment of persons or entities that are currently relying on one or more of the CEA exclusions or exemptions cited above might not qualify as an ESP and consequently would not be eligible for part 35. 76 FR at 42511, n. 40.

determining the terms of the swap agreement, including pricing, cost, or credit enhancement terms; and (4) they are not entered into or traded on a multilateral transaction execution facility.

Under part two of the relief provided for in the July 14 Order, the Commission stated that transactions in exempt or excluded commodities (and persons offering, entering into, or rendering advice or rendering other services with respect to such transactions) are temporarily exempt from provisions of the CEA that may apply to such transactions if such transactions comply with part 35, notwithstanding that: (1) the transaction may be executed on a multilateral transaction execution facility; (2) the transaction may be cleared; (3) persons offering or entering into the transaction may be eligible contract participants as defined in the CEA (prior to the enactment of the Dodd-Frank Act); (4) the transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or (5) no more than one of the parties to the transaction is entering into the transaction in conjunction with its line of business, but is neither an eligible contract participant nor an ESP, and the transaction was not and is not marketed to the public.¹⁵

Thus, for certain transactions, the July 14 Order provides relief notwithstanding that the transaction may not satisfy certain part 35 requirements (e.g., cleared, executed on a multilateral trade execution facility, entered into by certain persons that are not eligible contract participants, etc.). The Commission stated in the July 14 Order that this relief is limited to transactions in exempt and excluded commodities, and does not extend to transactions in agricultural commodities, because transactions in agricultural commodities were not covered by the

¹⁵ 76 FR at 42514. With respect to commodity options, the Commission made clear that options identified in the swap agreement definition in paragraph (b)(1)(i) of § 35.1 of the Commission's regulations and any options captured by the concluding catch-all language in that paragraph, as well as any options described in paragraphs (b)(1)(ii) and/or (iii) of § 35.1, involving excluded or exempt commodities are within the scope of the July 14 Order. 76 FR at 42514-15.

applicable statutory exclusions and exemptions in effect prior to July 16, 2011.¹⁶ The exemption in part two of the July 14 Order expires on the earlier of: (1) the repeal, withdrawal or replacement of part 35; or (2) December 31, 2011.

Category 4 contains those Dodd-Frank Act provisions for which the Commission determined not to issue relief, and which therefore went into effect on July 16, 2011. A complete list of the Category 4 provisions is included in the appendix to the July 14 Order.

The temporary exemptions issued in the July 14 Order are subject to several conditions. These conditions provide that the July 14 Order shall not: (1) limit in any way the Commission's anti-fraud or anti-manipulation authority under the CEA; (2) apply to any provision of the Dodd-Frank Act or the CEA that became effective prior to July 16, 2011; (3) affect any effective date or compliance date set forth in any rulemaking issued by the Commission to implement provisions of the Dodd-Frank Act; (4) limit the Commission's authority under Dodd-Frank Act section 712(f) to issue rules, orders, or exemptions prior to the effective date of any provision of the Dodd-Frank Act and the CEA, in order to prepare for such effective date; and (5) affect the applicability of any provision of the CEA to futures contracts or options on futures contracts, or to cash markets.¹⁷

II. Discussion of the Proposed Amendments to the July 14 Order

¹⁶ The Commission also stated, though, that because part 35 remained in effect at the time of the July 14 Order, market participants could continue to rely on part 35 with respect to swaps (other than commodity options) on enumerated agricultural commodities as defined in CEA section 1a(4) or § 32.2 of the Commission's regulations, as well as swaps and commodity options on non-enumerated agricultural commodities, to the extent these transactions fully comply with part 35. Under the July 14 Order, market participants also may continue to rely on part 32 for options on enumerated agricultural commodities to the extent these transactions are conducted in accordance with § 32.13(g) of the Commission's regulations. Rule 32.13(g) permits off-exchange options between producers, processors, commercial users or merchants of the commodity or its products or by-products that have a net worth of at least \$10 million.

¹⁷ 76 FR at 42522.

The Commission is proposing to amend the July 14 Order in two ways. First, the Commission is proposing to amend the July 14 Order to extend the potential latest expiry dates. With respect to provisions covered in the first part of the relief in the July 14 Order, the Commission is proposing that the temporary exemptive relief expire upon the earlier of: (1) the effective date of the applicable final rule further defining the relevant referenced term; or (2) July 16, 2012.¹⁸ This amendment addresses the potential that, as of December 31, 2011, the CFTC-SEC joint rulemakings “further defining” the referenced terms will not yet be effective. The Commission also is proposing to amend the July 14 Order to extend the expiry date of the second part of the relief in the July 14 Order until the earlier of: (1) July 16, 2012; or (2) such other compliance date as may be determined by the Commission. For the same reason stated by the Commission with respect to the second part of the relief provided in the July 14 Order, the proposed extension of this exemptive relief “will allow markets and market participants to continue to operate under the regulatory regime as in effect prior to July 16, 2011, but subject to various implementing regulations that the Commission promulgates and applies to the subject transactions, market participants, or markets.”¹⁹

Second, the Commission is proposing to include within the second part of the relief any agreement, contract or transaction that fully meets the conditions in part 35 as in effect on December 31, 2011. This amendment addresses the fact that such transactions, which were not included within the scope of the July 14 Order because the exemptive rules in part 35 covered them at that time, now require temporary relief because part 35 will no longer be available after

¹⁸ The date of July 16, 2012, is consistent with the potential transitional period provided in section 723(c) of the Dodd-Frank Act regarding former CEA section 2(h) and section 734(c) of the Dodd-Frank Act regarding former CEA section 5d (i.e., for “not longer than a 1-year period” following the general effective date of title VII) .

¹⁹ 76 FR at 42513.

December 31, 2011.²⁰ Accordingly, to ensure that the exemptive relief currently available for these transactions continues to be available after December 31, 2011, the Commission proposes to amend the July 14 Order to incorporate by reference the part 35 relief available as of December 31, 2011. Whereas the relief provided in part two of the July 14 Order was (and would remain) limited to transactions in excluded or exempt commodities, this proposed amendment also would include, beginning on January 1, 2012, transactions in agricultural commodities that fully meet the conditions in part 35 as in effect on December 31, 2011.²¹ The Commission proposes that this further amendment to the July 14 Order is necessary to ensure that the same scope of the exemptive relief available before December 31, 2011 is available to all swaps and extends through July 16, 2012, at the latest.

In proposing these amendments, the Commission continues to strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime. As stated above, the proposed July 16, 2012 date coincides with the potential transitional period provided in sections 723(c) and 734(c) of the Dodd-Frank Act.²² Further, should the Commission deem it appropriate to terminate or extend any exemptive relief under part two of

²⁰ The Commission recently promulgated a rule pursuant to section 723(c)(3) of the Dodd-Frank Act that, effective December 31, 2011, will repeal the existing part 35 relief and replace it with new § 35.1 of the Commission's regulations. See *Agricultural Swaps*, 76 FR 49291 (Aug. 10, 2011). Rule 35.1 provides, in pertinent part, that "agricultural swaps may be transacted subject to all provisions of the CEA, and any Commission rule, regulation or order thereunder, that is otherwise applicable to swaps. [It] also clarifies that by issuing a rule allowing agricultural swaps to transact subject to the laws and rules applicable to all other swaps, the Commission is allowing agricultural swaps to transact on [designated contract markets ("DCMs"), swap execution facilities ("SEFs")], or otherwise to the same extent that all other swaps are allowed to trade on DCMs, SEFs, or otherwise." *Id.* at 49296.

²¹ The Commission also is clarifying that, by operation of new § 35.1 of the Commission's regulations, the Commission's statement in adopting the July 14 Order that a DCM may list and trade swaps "under the DCM's rules related to futures contracts, without exemptive relief," 76 FR at 42518, would apply, as of January 1, 2012, to swaps in agricultural commodities.

²² See *Order Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade*, 75 FR 56513, Sept. 16, 2010.

the July 14 Order, the Commission will be in a better position to comprehensively evaluate and consider any tailored exemption at that time.

The Commission believes it is in the interest of the public and market participants to continue to provide regulatory certainty regarding the applicability of the Dodd-Frank Act. There have been no disruptions to the market resulting from the July 14 Order, nor has the Commission received any request for additional relief beyond that provided for in the July 14 Order. Accordingly, the Commission believes the scope of the existing relief is appropriate and is proposing here only to amend that relief in the aforementioned ways. The Commission notes, for example, that Category 1 provisions – i.e., those for which a rulemaking is required – will continue to be addressed outside the scope of the July 14 Order. Further, where appropriate, the Commission expects to phase-in compliance with its final rules over a period of time as part of the Commission’s ongoing commitment to ensuring an orderly transition to the new regulatory regime.

III. Request for Comment

The Commission requests and will only consider comments on the amendments to the July 14 Order that are proposed in this Notice.

IV. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act (“PRA”)²³ imposes certain requirements on Federal agencies (including the Commission) in connection with conducting or sponsoring any collection of information as defined by the PRA. These proposed amendments, if approved, would not

²³ 44 U.S.C. 3507(d).

require a new collection of information from any persons or entities that would be subject to the proposed amendments.

b. Cost-Benefit Considerations

Section 15(a) of the CEA²⁴ requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. CEA section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

This Notice proposes to amend the existing July 14 Order by extending the currently available temporary relief to no later than July 16, 2012, and by accounting for the repeal of part 35 of the Commission's regulations. As such, and because this proposal does not change the nature or limit the scope of relief granted in the July 14 Order, the costs and benefits set forth in the July 14 Order may be incorporated by reference in this proposal.²⁵ Nevertheless, the Commission seeks comment on whether these proposed amendments would impose any costs or confer any benefits beyond the July 14 Order.

V. Proposed Amendments to the July 14 Order

The Commission proposes the following amendments to the July 14 Order:

²⁴ 7 U.S.C. 19(a).

²⁵ 76 FR 42521.

The Commission, to provide for the orderly implementation of the requirements of Title VII of the Dodd-Frank Act, pursuant to sections 4(c) and 4c(b) of the CEA and section 712(f) of the Dodd-Frank Act, hereby issues this Order consistent with the determinations set forth above, which are incorporated in this Final Order, as amended, by reference, and:

- (1) Exempts, subject to the conditions set forth in paragraph (3), all agreements, contracts, and transactions, and any person or entity offering, entering into, or rendering advice or rendering other services with respect to, any such agreement, contract, or transaction, from the provisions of the CEA, as added or amended by the Dodd-Frank Act, that reference one or more of the terms regarding entities or instruments subject to further definition under sections 712(d) and 721(c) of the Dodd-Frank Act, which provisions are listed in Category 2 of the Appendix to this Order; provided, however, that the foregoing exemption:
 - a. Applies only with respect to those requirements or portions of such provisions that specifically relate to such referenced terms; and
 - b. With respect to any such provision of the CEA, shall expire upon the earlier of: (i) the effective date of the applicable final rule further defining the relevant term referenced in the provision; or (ii) July 16, 2012.
- (2) Exempts, subject to the conditions set forth in paragraph (3), all agreements, contracts, and transactions, and any person or entity offering, entering into, or rendering advice or rendering other services with respect to, any such agreement, contract, or transaction, from the provisions of the CEA, if the agreement, contract, or transaction complies with part 35 of the Commission's regulations as in effect as of December 31, 2011, including

any agreement, contract, or transaction in an exempt or excluded (but not agricultural) commodity that complies with such provisions then in effect notwithstanding that:

- a. The agreement, contract, or transaction may be executed on a multilateral transaction execution facility;
- b. The agreement, contract, or transaction may be cleared;
- c. Persons offering or entering into the agreement, contract or transaction may not be eligible swap participants, provided that all parties are eligible contract participants as defined in the CEA prior to the date of enactment of the Dodd-Frank Act;
- d. The agreement, contract, or transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or
- e. No more than one of the parties to the agreement, contract, or transaction is entering into the agreement, contract, or transaction in conjunction with its line of business, but is neither an eligible contract participant nor an eligible swap participant, and the agreement, contract, or transaction was not and is not marketed to the public;


Provided, however, that: (i) such agreements, contracts, and transactions (and persons offering, entering into, or rendering advice or rendering other services with respect to, any such agreement, contract, or transaction) fall within the scope of any of the existing CEA sections 2(d), 2(e), 2(g), 2(h), and 5d provisions or the line of business provision as in effect prior to July 16, 2011; and (ii) the foregoing exemption shall expire upon the earlier of: (I) July 16, 2012; or (II) such other compliance date as may be determined by the Commission.

(3) Provides that the foregoing exemptions in paragraphs (1) and (2) above shall not:

- a. Limit in any way the Commission's authority with respect to any person, entity, or transaction pursuant to CEA sections 2(a)(1)(B), 4b, 4o, 6(c), 6(d), 6c, 8(a), 9(a)(2), or 13, or the regulations of the Commission promulgated pursuant to such authorities, including regulations pursuant to CEA section 4c(b) proscribing fraud;
- b. Apply to any provision of the Dodd-Frank Act or the CEA that became effective prior to July 16, 2011;
- c. Affect any effective or compliance date set forth in any rulemaking issued by the Commission to implement provisions of the Dodd-Frank Act;
- d. Limit in any way the Commission's authority under section 712(f) of the Dodd-Frank Act to issue rules, orders, or exemptions prior to the effective date of any provision of the Dodd-Frank Act and the CEA, in order to prepare for the effective date of such provision, provided that such rule, order, or exemption shall not become effective prior to the effective date of the provision; and
- e. Affect the applicability of any provision of the CEA to futures contracts or options on futures contracts, or to cash markets.

In its discretion, the Commission may condition, suspend, terminate, or otherwise modify this Order, as appropriate, on its own motion. This Final Order, as amended, shall be effective immediately.

Issued in Washington, DC, on October 18, 2011 by the Commission.


David A. Stawick
Secretary of the Commission

Appendices to Notice of Proposed Amendment to Effective Date for Swap Regulation—
Commission Voting Summary and Statements of Commissioners

NOTE: The following appendices will not appear in the Code of Federal Regulations

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Sommers, Chilton and O'Malia voted in the affirmative; no Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the proposed amendment to the July 14th Exemptive Order regarding the effective dates of certain Dodd-Frank Act provisions.

The July 14th order provided relief until December 31, 2011, or when the definitional rulemakings become effective, whichever is sooner, from certain provisions that would otherwise apply to swaps or swap dealers on July 16. This includes provisions that do not directly rely on a rule to be promulgated, but do refer to terms that must be further defined by the CFTC and SEC, such as “swap” and “swap dealer.”

Commission staff is working very closely with Securities and Exchange Commission (SEC) staff on rules relating to entity and product definitions. Staff is making great progress, and we anticipate taking up the further definition of entities in the near term and product definitions shortly thereafter.

As these definitional rulemakings have yet to be finalized or become effective, today's proposed amendment would provide relief through July 16, 2012, or when the definitional rulemakings become effective – whichever is sooner.

The order also provided relief through no later than December 31, 2011, from certain CEA requirements that may apply as the result of the repeal, effective on July 16, 2011, of CEA sections 2(d), 2(e), 2(g), 2(h) and 5d. The proposed amendment also extends this relief to July 16, 2012, or until a date the Commission may otherwise determine with respect to a particular requirement under the CEA.

In addition, today's proposed amendment also tailors the July 14th relief in light of the Commission's actions finalizing the agricultural swap rules.

Appendix 3—Statement of Commissioner Scott O'Malia

As Yogi Berra famously proclaimed: "It is déjà vu all over again." Yogi perfectly encapsulates my feelings today. We find ourselves again voting on a proposed order aimed at providing legal certainty in the form "temporary exemptive relief" for swap market participants that extends the soon to expire relief found in the Commission's July 14, 2011 exemptive order ("July 14 Order"). This temporary relief is necessary because: (1) the Commission has not yet put forth final rules defining such key terms such as "swap" and "swap dealer"; and (2) certain exemptions and exclusions for transactions in exempt and excluded commodities currently relied upon by market participants will be repealed effective December 31, 2011. The proposal states: "[t]he Commission proposes that this further amendment to the July 14 Order is necessary to

ensure that the same scope of the exemptive relief available before December 31, 2011 is available to all swaps and extends through July 16, 2012, at the latest.”

Unfortunately, we are once again facing an exemptive order that suffers the same faults that the July 14 Order suffered, namely: (1) it again includes an arbitrary sunset provision that will cut the transition period short and so will likely not provide necessary “relief” to market participants, and (2) it demonstrates the lack of ordering of rulemakings combined with the failure to put forth an implementation schedule. We now need to broaden the scope of the July 14 Order because the exemptive rules contained in part 35 will no longer be available to market participants after December 31, 2011 even though the replacement regulatory regime is not in place yet.²⁶ Part 35 is more commonly known as the swap exemption and is relied upon primarily by entities engaging in agricultural swaps. The Commission repealed part 35 in order to ensure that it is not used by individuals and entities who had relied on Sections 2(d), (g) and (h) of the Commodity Exchange Act (“CEA”) as an end run around the new statutory and regulatory requirements.

I support the proposal, as I did last time, because it is important for the Commission to provide market participants and the public with the form of relief the exemptive order is contemplating, but I would have preferred that this rule, like its predecessor, would not select an arbitrary end date.

Mr. Chairman, I again renew my call for a comprehensive rulemaking schedule and implementation plan, that provides greater insight on reporting requirements to swap data repositories as well as separate rulemaking on real time and block rules. The Commission must

²⁶ The Commission recently promulgated a rule pursuant to section 723(c)(3) of the Dodd-Frank Act that, effective December 31, 2011, will repeal the existing part 35 relief and replace it with new § 35.1 of the Commission’s regulations. See Agricultural Swaps, 76 FR 49291 (Aug. 10, 2011).

also provide some certainty on the clearing and trading mandate including clarification of “made available for trading” and guidance on swap clearing.